

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

MARK T. EDDINGSTON,	§
JEFFERY M. DAVIS	§
ELRIDGE NICHOLAS BOLLICH	§
and RAY A. COX	§
Plaintiffs,	
V.	§ Civil Action No. 2:12-CV-00422
UBS FINANCIAL SERVICES, INC.	§
Defendant.	

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

BILL HENDRICKS,	§
AUBREY B. STACY	§
Plaintiffs,	
V.	§ Civil Action No. 2:12-CV-00606
UBS FINANCIAL SERVICES, INC.	§
Defendant.	

PLAINTIFFS' RESPONSE TO DEFENDANT'S RENEWED  
MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND COMPEL ARBITRATION

Plaintiffs hereby respond to Defendant's renewed motion to dismiss Plaintiffs' complaint and compel arbitration:

1. It is true that, in light of the decision of the Fifth Circuit Court of Appeals, this Court must compel arbitration. However, an appeal of the decision may be made by Plaintiffs to the United

States Supreme Court at any time prior to March 1, 2014, and could be accompanied by either an agreed or involuntary stay.

2. In the meantime, based on the decision itself, it is not appropriate for this Court to simply enter an order compelling arbitration without more, as Defendant's motion and proposed order suggest. The Court of Appeals' decision included the following statement:

We conclude that the PartnerPlus Plan's lack of a class waiver does not relieve the Plaintiffs from their independent obligation to submit their claim to arbitration based on the Compensation Plan. Nevertheless, having concluded that the Compensation Plan's arbitration provision requires the Plaintiffs to submit their claim to arbitration, we leave for the FINRA arbitration panel to decide whether the class waiver requires the Plaintiffs to arbitrate on an individual basis.

In support of that proposition, the Court of Appeals cited Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451 (2003), addressing the issue of class arbitration. The decision, however, also cited Petrofax, Inc. v DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012), addressing the threshold issue of arbitrability, and observed, with respect to the issue of arbitrability tied to Plaintiffs' request for injunctive relief:

Nevertheless, in light of the Plaintiffs' broad request for all appropriate equitable relief under §1132(a)(3) and our conclusion that the dispute must, in the first instance, be sent to arbitration, we leave the initial decision of the scope of arbitration to the arbitration panel. See Bazzle, 539 U.S. at 451; Petrofac, 687 F.3d at 675.

In footnote 4 of its decision, finally, the Court of Appeals also further deferred to an arbitration panel the determination of the effect of FINRA Rule 13204, "provid[ing] that a '[c]lass action claim[ ] may not be arbitrated,'" stating, "[h]aving concluded that the arbitration clause in the Compensation Plan requires arbitration, we leave for the arbitrator to determine this rule's potential effect of the arbitration proceedings."

3. By refusing, as indicated, to resolve threshold issues of arbitrability, including the scope of arbitration, tied to enforceability of the class waiver and Plaintiffs' request for injunctive PLAINTIFFS' RESPONSE TO DEFENDANT'S RENEWED MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND COMPEL ARBITRATION - Page 2

relief, the Court of Appeals recognized that the FINRA arbitration panel may actually find Plaintiffs' claims not arbitrable at all, or only in part, and may, under Rule 13204, throw all or part of Plaintiffs' claims back to this Court. In light of these possibilities, the order to be entered should stay, rather than dismiss, this action, pending an arbitration panel's decision as to enforceability of the class waiver and the significance of Plaintiffs' request for injunctive relief, and the implication of a determination of such issues under FINRA Rule 13204. Any order compelling arbitration should further specifically direct the arbitration panel, as a threshold matter, to address the questions of arbitrability, including scope of arbitration, tied to such issues and also address the issue of class arbitration.

WHEREFORE, Plaintiffs request that the Court enter an order in the form of that attached rather than the order proposed by Defendant.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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